UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

GRAYMONT (PA), INC.

and **Case 06-CA-126251**

LOCAL LODGE D92, UNITED CEMENT, LIME, GYPSUM AND ALLIED WORKERS, A DIVISION OF INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

RESPONDENT GRAYMONT (PA), INC'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE CASE

A. Introduction and Issues

Respondent Graymont (PA), Inc. ("Graymont" or the "Company"), pursuant to Section 102.46 of the Board's Rules and Regulations, submits this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge ("ALJ") David I. Goldman dated December 30, 2014.[1] The ALJ found that Graymont violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the "Act"), 29 U.S.C. 158(a)(1) and (5) by unilaterally implementing certain changes to its work rule disciplinary and absenteeism policies without providing an opportunity to bargain over the changes to Local Lodge D92, United Cement, Lime, Gypsum and Allied Workers, a Division of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO (the "Union"). In reaching his recommended decision, the ALJ misapplied the "clear and unmistakable waiver" standard to the parties' bargaining history and contractual management rights language and found that the changes at issue were "material" and "significant" despite the lack of any supporting evidence in the record. The ALJ also erred in refusing to defer the remaining unilateral change allegations to the parties' agreed-upon grievance and arbitration procedure, despite dismissal of the Complaint's information request allegations. Finally, the remedy ordered by the ALJ is overly broad and improper and must be modified – in the event the alleged violations are upheld by the Board – to address the specific conduct at issue, and in a manner that permits lawful conduct.

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[1] References herein to the Administrative Law Judge's Decision shall be as follows: (ALJD, p. ___). References to the transcript of proceedings from the hearing in this matter shall be as follows: (Tr. __). References to the exhibits presented and admitted during the hearing shall be as follows: General Counsel Exhibit (GC Ex. __); Respondent Exhibit (R. Ex. __); and Joint Exhibit (Jt. Ex. __).

B. Statement of Relevant Facts

1. Operations and Bargaining History at Graymont (PA) Inc.'s Facility in Pleasant Gap, Pennsylvania

Graymont (PA), Inc. is engaged primarily in the business of mining limestone and manufacturing lime products. (Tr. 14, 73). The Company operates two lime production plants in the Pennsylvania area – one in Pleasant Gap and one in Bellefonte. (Tr. 14, 15, 73). The Pleasant Gap and Bellefonte facilities, collectively, consist of about 150 employees, approximately 120 of whom are bargaining unit employees represented by the Union. (Tr. 15, 74). The most recent collective bargaining agreement between the parties went into effect June 1, 2014 and expires on May 31, 2017 (the "Agreement"). (Tr. 15-16, 91). The effective dates of the parties' three previous collective bargaining agreements were June 1, 2011 to May 31, 2014 (the "2011-2014 Agreement"), June 1, 2006 to May 31, 2011 (the "2006-2011 Agreement"), and June 1, 2001 to May 31, 2006 (the "2001-2006 Agreement"), respectively. (Tr. 16; Jt. Ex. 1; R. Exs. 1 and 6).

For at least 20 years, the Company has maintained a set of work rules for the Pleasant Gap and Bellefonte facilities. (Tr. 18-19; Jt. Ex. 2). The work rules are organized into three categories – Group A, Group B, and Group C – according to the seriousness of the related offenses. (Jt. Ex. 2). Group A infractions are the least serious, generally resulting in progressive discipline (beginning with a written warning) for the first, second and third violations, while Group C infractions are the most serious and may result in immediate discharge for the first offense. (Jt. Exs. 2 and 4). The collective bargaining agreement requires that all discipline imposed by the Company be supported by just cause. (Jt. Ex. 1, Art. I, § 8). Until 2005, the work rules also contained a "Policy on Absenteeism," which stated, in general terms, that if an employee was "habitually absent," the Company would notify the employee and the Union in

writing that the employee's attendance was "unsatisfactory and unacceptable." (Tr. 18-19; Jt. Ex. 2). The policy further provided that continued poor attendance would result in the employee's probation and eventual discharge. (Jt. Ex. 2). Beginning in 2003 (while the 2001-2006 Agreement was still in effect), and throughout 2004, the Company and the Union engaged in various discussions regarding the need to revise the absenteeism policy to provide more certainty and consistency with respect to employee attendance expectations. (Tr. 107-108; ALJD, p. 5, lines 23-40). At that time, the management rights language between the parties had consisted of the following single sentence: "All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain exclusively vested in the Company." (Tr. 48; R. Ex. 1). In 2005, following discussion with and input from the Union, the Company revised the "Policy on Absenteeism" to make it a standalone document that set forth a disciplinary progression based on the number of occurrences of unexcused absence (the "2005 Absenteeism Policy").[2] (Tr. 97, 107-108; Jt. Ex. 3). The 2005 Absenteeism Policy remained in place until it was revised in March 2014 (*see infra*). (Tr. 95, 108; ALJD, p. 6, lines 14-15).

2. The Parties Negotiate and Agree to an Expanded Management Rights Clause During the 2006 Negotiations

In April of 2006, during the negotiations for the 2006-2011 Agreement, the Company proposed a significantly expanded management rights clause for inclusion in the new contract, and submitted as its initial proposal the following:

> "The Employer retains the sole and exclusive rights to manage; to direct its employees; to hire, to assign work, to transfer, to promote, to demote, to layoff, to recall, to evaluate performance, to determine qualifications, to discipline and

[2] The 2005 Absenteeism Policy provided that formal discipline would commence after the employee accumulated six (6) occurrences of unexcused absence. Upon reaching nine (9) occurrences within a twelve (12) month period, the employee received a "last chance notice," which remained in effect for twenty-four (24) months from the date of the ninth incident. (Jt. Ex. 3; ALJD, p. 5, lines 44-50; p. 6, lines 1-10).

> discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; to set and establish standards of performance for employees; to determine the number of employees, their duties and the hours and location of their work; to establish, change or abolish positions; to create and implement training and development programs for employees; to determine whether outside contract drivers will load their trucks, or employees of the Employer will do so; to implement drug and alcohol testing rules and procedures that are consistent with applicable law; to create any new service or function; to make technological changes; to convert existing shifts from eight to twelve hours, twelve to eight hours, or back again, following reasonable notice; to install or remove any equipment; and/or to subcontract work that employees are not reasonably capable of doing due to the scope, timing or economic feasibility, where the employees lacks the skill or ability, and/or in a manner consistent with established practices or, provided that subcontracting will not be used to diminish or displace bargaining unit positions. The rights expressly reserved by this Article are merely illustrations of and are not inclusive of all of the rights retained by the Employer. The rights expressly reserved by this Article are subject to the terms and conditions of the Agreement, and to the extent there is a conflict the terms and conditions of this Agreement shall prevail.
>
> All of the usual and customary rights of management not specifically abridged or modified by this Agreement shall remain exclusively vested in the Company."

(Tr. 109, 114, 126; R. Ex. 3-F). The parties then negotiated over the Company's proposal, and agreed to several changes to the language originally proposed by the Company. (Tr. 109; R. Ex. 3). For example, the Union proposed that the language allowing the Company "to convert existing shifts from eight to twelve hours, twelve to eight hours, or back again, following reasonable notice" be removed, which the Company agreed to do in exchange for the Union's withdrawal of one of its proposals and agreement to another one of the Company's proposals. (Tr. 109, 126; R. Exs. 3-A and 3-E). (The "eight to twelve hours" shift language was eventually replaced with the phrase "to determine shifts.") (R. Ex. 3-C). Additionally, the Union proposed revising the phrase "new service or function" to read "new process" and moving the Company's language addressing subcontracting work out of the proposed management rights clause and into a separate section specifically addressing subcontracting. (Tr. 109, 111, 126; R. Ex. 3-E). The Company agreed to both changes. (Tr. 109; R. Ex. 3-E). Having secured these specific changes,

the Union agreed to the significantly expanded management rights language being proposed by the Company. (R. Exs. 3-D and 3-E).[3] The new management rights clause – which specifically reserves to the Company, among other things, the right "***to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; to set and establish standards of performance for employees***" – was thereafter incorporated into the 2006-2011 Agreement, and has remained in place, unchanged, in the parties' subsequent collective bargaining agreements, since. (Tr. 18, 54, 117, 126; R. Ex. 6; Jt. Ex. 1) (emphasis added).[4]

3. The Company's 2014 Changes to the Work Rules and Absenteeism Policy

The Company decided in late 2013 that, based on its performance and production goals for the upcoming 2014 year, it needed to implement several changes to the work rules and put into place a less lenient absenteeism policy. (Tr. 84, 102). The Company informed the Union that it was planning to modify the work rules, and provided a draft of the proposed changes at a policy meeting[5] it requested with the Union on February 14, 2014 (the "February 14, 2014 Policy

[3] The Union's President, Dan Ripka ("Ripka"), testified that the Union simply accepted the Company's management rights language as proposed, without discussion or negotiation. (Tr. 17-18). Clearly, Ripka was attempting to downplay discussion of the fact that the Union did negotiate over specific details of the management rights clause.

[4] Ripka testified that in late 2006, shortly after the 2006-2011 Agreement (and its expanded management rights language) went into effect, the Union purportedly sent two letters to the Company requesting bargaining over the Company's then-proposed "new rules policy" (a copy of which was not found in the Union's files or introduced at the hearing). There is no evidence that the Company ever agreed or acknowledged an obligation to bargain over any alleged changes to the work rules at that time. (Tr. 42-46; GC Exs. 7-8). Indeed, Ripka could recall only that the Company declined to implement the proposed modifications after Ripka pointed out to Rich Fenush ("Fenush"), the Company's Plant Superintendent at the time, that the changes were unnecessary because the concerns raised by the Company could be resolved by application of the then-current rules. (Tr. 46, 62).

[5] It is the practice of the Union and the Company to hold "policy meetings" to discuss certain policies and issues that arise. (Tr. 20). Either the Company or Union may request a policy meeting. (Tr. 20). Four to six people representing the Company and the Union, respectively, are typically present at each meeting. (Tr. 16, 32, 36, 68, 79; ALJD, p. 5, line 31). Shawn Miller ("Miller"), the Company's Office Coordinator, takes notes at each policy meeting and provides the Union with copies of the minutes (in person or via e-mail) after each meeting. (Tr. 20).

Meeting").[6] (Tr. 32, 33, 57, 76, 79, 104). Martin Turecky ("Turecky"), the Company's Plant Manager and its spokesman at the February 14, 2014 meeting, testified that most of the proposed changes consisted of either clarifications to and/or general "cleaning-up" of existing rules, or re-categorization / removal of certain rules altogether. (Tr. 77). Specifically:

- Group A work rule 4 (which stated "Continued tardiness will not be permitted") was deleted. Tardiness was instead addressed in a separate policy added to the rules, which clarified that four or more tardies in a twelve-month period constituted a violation of Group A work rule 6 (poor work habits).
- Group A work rule 7 (dealing with "loafing") was deleted.
- Group A work rule 13 (now rule 11) was modified by deleting the phrase "shall be cause for disciplinary action."
- Group A work rule "penalties for infractions" was modified from "The following penalties for infractions of Group A rules will be imposed in one year's time from the last violation" to "The discipline progression will normally only be reset after an employee works twelve (12) consecutive months free of any work rule violations" but the specific progressive discipline penalties remained unchanged. That same modification was also included in the Group B provision dealing with the progressive discipline steps.
- Group C work rule 1 (dealing with insubordination) was modified by deleting the phrase "and will subject the offender to discipline up to and including discharge."
- Group C work rule 7 (dealing with criminal convictions) was deleted.
- The specific call-in number listed in Group A work rule 1 (dealing with call-ins) was replaced with an instruction to "call the report off phone number assigned by [the employee's] supervisor," as the original number was no longer in use.
- A specific reference to the Company's Code of Business Conduct and Ethics was added to the preamble to the rules. It stated: "This set of work rules is in

[6] Present at the February 14, 2014 Policy Meeting for the Company were Plant Manager Martin Turecky ("Turecky"), Darryl Sharp ("Sharp"), Miller, Junior Russell ("Russell") and Ryan Fisher ("Fisher"). (Tr. 32, 79). Present for the Union were Ripka, Eric Robb ("Robb"), Ralph Houser ("Houser"), Chairman of the Grievance and Policy Committee, Tom Evock ("Evock"), Tony Zeigler ("Zeigler") and Bill McElwain ("McElwain"). (Tr. 16, 32, 68, 79).

no way conclusive. For example, the Code of Business Conduct and Ethics applies as well."

- The work rules relating to sleeping on the job and failure to follow proper lock out / tag out procedures were moved from Group C to Group B.

(Tr. 77, 96; Jt. Exs. 2 and 4). Additionally, the Company added the following to the proposed rules: "NOTE: Group A and Group B violations will be combined in discipline progression. Please reference the chart in this document." This phrase was followed by a grid clarifying exactly how different Group A and Group B violations would be combined to determine the appropriate disciplinary penalty.[7] (Tr. 77, 100, 102; Jt. Exs. 2 and 4).

With respect to the 2005 Absenteeism Policy (which, at that time, existed as a separate document), the Company proposed integrating the policy into the work rules and revising the language to allow for one unexcused absence (as opposed to six) before progressive discipline would be issued. (Tr. 78, 79; Jt. Ex. 4). Any further unexcused absences would be regarded as a violation of Group A work rule 6 (poor work habits). (Jt. Ex. 4). The parties stipulated at the hearing that the Company's changes to the 2005 Absenteeism Policy are "material and substantial." (Tr. 6).

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[7] The ALJ found that prior to the implementation of the revised rules in March 2014, "violations of different classifications (for instance, [a] single violation of Group A and a single violation of Group B) were not combined for purposes of imposing progressive discipline." (ALJD, p. 5, lines 1-3). However, this finding is wholly unsupported by the evidence in the record. Indeed, the only testimony offered by the General Counsel on this issue was that of Ripka who stated that "to [his] knowledge," the Company did not "pyramid" the two classifications of discipline, Group A and Group B, prior to 2014. (Tr. 30-31). But the General Counsel offered no additional evidence to explain what Ripka meant by the term "pyramid," and whether that term refers to a process distinct from (or the same as) the one set forth in the grid. Turecky's unrebutted testimony was that the Company and the Union had a difference of opinion as to whether A violations and B violations could be combined for purposes of determining the appropriate disciplinary step. (Tr. 99). Turecky also testified that the Company had discretion under the old rules and the new rules regarding the application of discipline. (*Id.*). The General Counsel did not present evidence of any specific case showing that, prior to March 1, 2014, the Company imposed discipline for any given series of Group A and Group B violations in a manner different than what is outlined in the grid. As such, there is *no* basis in the record for the ALJ's finding that Group A and Group B violations were not combined for purposes of progressive discipline before the implementation of the revised rules in March 2014. At best, the evidence is inconclusive.

At the February 14, 2014 Policy Meeting, Turecky informed the Union that the revised rules would be implemented on March 1, 2014 and invited it to share any comments it might have. (Tr. 33, 79-80). After a brief caucus, the Union returned to the meeting and Ripka stated that the Union would not comment on the work rules and instead, was filing a first step grievance with respect their implementation.[8] (Tr. 33-34, 57, 80; Jt. Ex. 5). The meeting ended shortly thereafter. (Tr. 80). However, later that day, the Union informed Turecky that it wanted to "discuss the rules" after all and that the Union was withdrawing its first step verbal grievance.[9](Tr. 34-35, 57-58, 81). Turecky agreed, and the parties scheduled a follow-up meeting to take place on February 25, 2014 (the "February 25, 2014 Policy Meeting"). (Tr. 34-35, 81). Approximately a week before the February 25, 2014 Policy Meeting, the Company received a letter from the Union requesting copies of memos, data and any other materials upon which the Company had "relied" in deciding to revise the work rules and 2005 Absenteeism Policy, minutes from any policy meeting in the past five years at which work rules, the 2005 Absenteeism Policy and/or discipline had been discussed, and any decisions or agreements reached between the parties regarding same. (the "February 17, 2014 Information Request"). (Tr. 36, 81; Jt. Ex. 6).

The parties met as planned on February 25, 2014.[10](Tr. 58; Jt. Ex. 8). Turecky opened the meeting by presenting the Company's letter of response to the Union's information request,

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[8] Under the terms of the parties' collective bargaining agreement, first step grievances are made verbally. (Tr. 35; Jt. Ex. 1; R. Exs. 1 and 6).

[9] Notwithstanding the Union's withdrawal of its first step verbal grievance on February 14, 2014, the Company is prepared to waive any procedural objections to arbitrating the instant dispute if the Board defers the remaining unilateral change allegations to the parties' contractually-provided grievance and arbitration procedure. (Tr. 94).

[10]Present at the February 25, 2014 Policy Meeting for the Company were Turecky, Miller, Sharp, Fisher and Russell. (Tr. 36, 68). Present for the Union were Ripka, Hoover, Evock, McElwain, Robb and Houser. (Tr. 36, 68).

which stated that because the parties' then-current collective bargaining agreement reserved to the Company the sole and exclusive right to "adopt and enforce rules and regulations and policies and procedures," the Company had no duty to bargain over the rules modifications and therefore, no duty to provide the requested information.[11] (Tr. 39-40, 58, 69, 81-82; Jt. Ex. 7). Turecky also explained, as stated in the response letter, that the Union already had copies of all the policy meeting minutes, since the Company, as a matter of course, sends copies of the minutes to the Union after each policy meeting (*see* footnote 5). (Tr. 58, 85-86; Jt. Ex. 7). The response letter also requested that the Union furnish to the Company copies of any documents indicating that the parties had any agreements which would prevent or limit the Company's right to adopt changes in policies.[12] (Jt. Ex. 7).

After explaining the Company's response to the information request, Turecky invited the Union to share any concerns it had regarding the revised work rules and absenteeism policy. (Tr. 36-37, 58, 70, 82, 87). In response to the Union's comments, the Company agreed to make several changes to the proposed rules, including removal of the word "normally" from the discipline resetting provisions and elimination of the rule prohibiting "unauthorized use" of Company phones entirely. (Tr. 59-60, 88). Turecky then informed the Union that the Company would be proceeding with the implementation of the revised work rules on March 1, 2014, as originally planned. (Tr. 88-89). The Union received a final revised draft of the new rules from

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[11] Although not raised by the Company at the time, the Company did not (and does not) possess any information responsive to the Union's request. Turecky testified during the hearing that the Company had not relied on any summary discipline and/or attendance reports in making its decision to modify the rules. (Tr. 83). Nor had any documents containing production capacity predictions or relating to any performance-related programs been reviewed in connection with preparing the proposed changes. (Tr. 84-85). The Company notified the Union regarding the lack of responsive information in August 2014 and explained that the work rules had changed simply because the Company felt that they would be a better way to run the business. (Tr. 66).

[12] The Union has not produced any agreements between the parties regarding the Company's ability to revise work rules. (Tr. 86).

the Company on February 27, 2014. (Tr. 40-41). This version – which incorporated the changes proposed by the Company at the February 14, 2014 Policy Meeting, as well as the revisions the Company agreed to at the February 25, 2014 Policy Meeting – was implemented effective March 1, 2014. (Tr. 41, 71, 90-91; Jt. Ex. 9).[13]

II. ARGUMENT

The ALJ concluded that the Company violated Sections 8(a)(5) and (1) of the Act by unilaterally implementing changes to its work rules, finding that the Union had not "clearly and unmistakably" waived its right to bargain over such changes by virtue of the parties' management rights language, and that the changes were sufficiently "material and significant" to require bargaining. Additionally, despite dismissing the Complaint's information request allegations, the ALJ refused to defer the remaining unilateral change allegations to the parties' agreed-upon arbitration procedure. As explained in more detail below, the ALJ's conclusions – which have no basis in the law or the evidence in the record – are inappropriate, and must be set aside. Furthermore, the remedy proposed by the ALJ to address the alleged violations is overly broad and improper, and must be modified if, contrary to the record evidence, the ALJ's conclusions are upheld.

[13] During the parties' negotiations over the current Agreement (effective June 1, 2014 to May 31, 2017), the Union proposed several significant modifications to the Agreement's management rights clause. (Tr. 92; R. Ex. 2). Most notably, the Union proposed incorporating the entirety of the Company's work rules directly into the Agreement and providing for the review and negotiation – by both parties – of any proposed changes to the rules. (Tr. 64, 93; R. Ex. 2). The Company rejected these proposals consistently throughout the negotiations and the parties reached accord on the final terms of the Agreement in June 2014. (Tr. 91). The management rights language in the Agreement (which has been signed but not yet reduced to writing) is identical to the expanded management rights language negotiated in 2006. (Tr. 64, 91, 94, 117).

A. The ALJ Erred in Concluding That The Company Violated Sections 8(a)(5) and (1) of the Act by Unilaterally Implementing Changes to Its Work Rules

While it is axiomatic that Section 8(a)(5) prohibits an employer from unilaterally changing terms and conditions of employment, an employer does not act unilaterally in violation of the Act where the union has waived its right to insist on bargaining over a particular subject or where the parties have agreed in advance that the employer shall have such authority. *Fresno Bee*, 339 NLRB 1214, 1214 (2003); *Provena Hospitals*, 350 NLRB 808, 810-12, 817- 818 (2007) (Hayes, dissenting). Moreover, even in the absence of a waiver, the Board has long held that not every unilateral change in work rules constitutes a breach of the employer's bargaining obligation under Section 8(a)(5). *Peerless Food Products, Inc.*, 236 NLRB 161, 161 (1978). Rather, an employer violates Section 8(a)(5) (and by extension, Section 8(a)(1)) by revising a rule without bargaining with the union only where the change is "material, substantial and significant." *Fresno Bee*, 339 NLRB at 1214 (2003); *Berkshire Nursing Home, LLC*, 345 NLRB 220, 220-221 (2005). The ALJ erred in concluding that the Company violated the Act when it unilaterally implemented changes to its work rules, disregarding the clear and unambiguous language of the parties' management rights clause and the parties' bargaining history.

1. The ALJ Erred by Concluding that the Management Rights Clause Did Not Clearly and Unmistakably Waive the Union's Right to Bargain Over Work Rule Changes

The Board has generally held that a union may waive its statutory right to bargain over particular terms and conditions of employment provided the waiver is "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 n.12 (1983); *Provena*, 350 NLRB at 810-12. A waiver may occur in any of three ways: by express provision in the collective bargaining agreement, by the conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. *American Diamond Tool, Inc.*, 306 NLRB 570, 570

(1992); *Caraustar Mill Group, Inc.*, 339 NLRB 1079, 1082-83 (2003); *Kennametal, Inc.*, 358 NLRB No. 68, at *2-3 (June 26, 2012). A management rights clause that grants the employer authority to take a particular action is routinely held by the Board to constitute a clear and unmistakable waiver of a union's right to bargain over that subject. *See e.g., Provena*, 350 NLRB at 815; *United Technologies Corp.*, 287 NLRB 198, 198 (1987); *Caraustar Mill Group*, 339 NLRB at 1083. In determining whether a union, by agreeing to a management rights clause, has "clearly and unmistakably" waived its right to bargain over a particular subject, the Board looks to the precise wording of the relevant contract provision(s). *Crittenton Hospital*, 342 NLRB 686, 691 (2004); *Provena,* 350 NLRB at 811.

a. The ALJ's Strained and Constricted Interpretation of the Agreement's Management Rights Language

Relying on the proposition that waiver may not be inferred from "general" contractual provisions, the ALJ concluded that the Union had not clearly and unmistakably waived its right to bargain over changes to the work rule discipline and absenteeism policies by virtue of the expanded management rights clause because there is no specific reference to attendance, absenteeism or changing the standards of progression for discipline in the clause, nor any explicit discussion of these subjects during the parties' negotiation of the clause in 2006. (ALJD, p. 21, lines 18-22; p. 23, lines 9-13). This is a "strained and constricted interpretation" of the facially clear language of the management rights clause. *See Baptist Hospital of East Tennessee*, 351 NLRB 71, 73 (2007). In *Baptist Hospital* – a case the ALJ cites in support of his decision but which actually supports the Company's position – the Board found that the judge had erred by ruling that a union had not clearly and unmistakably waived its right to bargain over the employer's unilateral change to its holiday scheduling policy by agreeing to a management rights clause that allowed the employer to "determine and change starting times, quitting times and

shifts." *Id.* at 74. Relying on the fact that there was no specific reference to "schedule," "scheduling" or "holidays" in the management rights clause, the judge contended that the contract terms in question could only be interpreted as the right to "set the starting and quitting times for employees...and to designate the number of shifts to be worked in a day." *Id.* at 74. In reversing the judge's decision, the Board found the judge's interpretation of the management rights language to be unreasonable, and emphasized that "the language must be read, **in conjunction** with the other management rights to 'assign employees' and 'determine or change methods and means' of conducting operations, to also encompass the scheduling of employees and work shifts. **The lesser right [of holiday scheduling] is necessarily included in the more general right granted by [the management rights clause]."** *Id.* at 73 (emphasis added).

The analysis in *Baptist Hospital* applies with equal force here and requires a finding of waiver. The management rights clause does not simply grant the employer the right to adopt and enforce "shop rules," as analogized by the ALJ. To the contrary, the parties agreed on far more descriptive examples in a very deliberate manner. The cumulative and intentional phrasing of the management rights language at issue – *i.e.*, "to adopt and enforce rules and regulations and policies and procedures" – as well as the breadth and detail of the provision overall, evinces the parties' intent to reserve to the Company a "general right" to establish rules and policies addressing any and all employee conduct, including the Company's "lesser rights" with respect to attendance and discipline. (Jt. Ex. 1) (emphasis added). When read "in conjunction" (as the *Baptist Hospital* Board instructs) with the other rights enumerated in the clause – "to discipline and discharge for just cause" and "to set and establish standards of performance for employees" – the Company's contractual privilege to act unilaterally with respect to its work rule discipline and attendance policies could hardly be clearer. The Company's absenteeism and tardiness

policies – under both the old and the new rules – clearly set out numerical benchmarks, *i.e.*, standards, to gauge employees' *performance* of certain attendance-related requirements (e.g., six incidents of absenteeism will result in a written warning; more than three incidents of tardiness constitutes a violation of Group A work rule 6, etc.), and to contend that the Company's expressly reserved right to set and establish performance standards does not encompass the right to determine such attendance standards not only defies logic and a common sense understanding of the language used by the parties when negotiating collective bargaining agreements, but also imposes unrealistic burdens on parties who will be forced to spell out specifically every possible type of rule or scenario that might be encompassed by the right to establish rules, regulations, procedures, policies and performance standards.

Notably, the ALJ pointedly ignores the important "standards of performance" language in his analysis; in assessing the contents of the management rights clause, he references only the Company's right to "discipline and discharge for just cause" and "adopt and enforce rules and regulations and policies and procedures." (ALJD, p. 21, lines 20-22.) The ALJ then chooses to focus on trivial semantics to legitimize his holding. For instance, the ALJ contends that the Company's management right "to discipline and discharge for just cause" only allows "the employer to function in accordance with existing contractually agreed-upon procedures, not to change them." (ALJD, p. 21, lines 38-40). In "support" of this sweeping assertion, the ALJ cites to *California Offset Printers*, 349 NLRB 732, 732 (2007), in which the Board reversed a judge's finding of waiver based on an employer's management right to "establish and enforce shop rules not in conflict with the contract" and "maintain discipline and efficiency of employees." However, in that case, the disputed management rights provision preserved the employer's right to "<u>maintain</u> discipline" – language that did not entail, in the Board's opinion, "the right to

change the status quo or expand the existing terms as to what conduct is actually subject to discipline," and is, in any event, entirely distinguishable from the Company's straightforward (and all-inclusive) right to "discipline and discharge." *California Offset Printers*, 349 NLRB at 734. Moreover, *California Offset Printers* involved the Company's unilateral implementation of an on-call policy, which established, as *new* grounds for discipline, employees who could not be reached during their time off. *Id.* at 733. That is patently not the case here, as the Company's employees have been subject to discipline for the infractions outlined in the rules – including absenteeism and tardiness – even before the revisions in March 2014.

The ALJ also points to *Windstream Corp.*, 355 NLRB 406 (2010), incorporating *Windstream Corp.*, 352 NLRB 44, 50 (2008), for the proposition that an employer's contractually-enumerated right to discipline "for cause" has been held by the Board "as evidence contrary to the waiver of bargaining on the subject." (ALJD, p. 21, lines 40-44). This is a gross distortion of the Board's ruling in *Windstream*. In *Windstream*, the Board held that the parties' contractual grievance and arbitration provision, which stated that employee discipline would be reviewed under a "just cause" standard, was antithetical to a finding of waiver of the union's right to bargain over a *zero-tolerance* disciplinary policy – not a finding of waiver generally. *Windstream*, 352 NLRB at 50. Finally, the ALJ attempts to distinguish *Provena* – cited by the Company in its post-hearing brief, and holding that a union had waived its right to bargain over implementation of a revised attendance and tardiness disciplinary policy by virtue of management rights language that permitted the Company to "make and enforce rules of conduct," "suspend, discipline and discharge employees," and "change reporting practices and procedures and/or to introduce new or improved ones" – by noting that the parties' management rights clause contains no specific right "to change reporting practices and procedures" or "any

other reference to attendance or tardiness." (ALJD, p. 23, lines 2-4.) However, as stated by the Board in *United Technologies* – which found waiver of a right to bargain over a change in an employer's disciplinary practices based on the employer's contractual privilege "to make and apply rules and regulations for...discipline..." – "the fact that the [employer's] action...was characterized as changing a rule rather than making a rule is **merely a semantical difference**. The [employer's] action could be as readily viewed as rescinding its rule on discipline for absenteeism and making a new rule on the same subject." 287 NLRB at 198 (emphasis added). And, as discussed above, rules relating to attendance and/or tardiness fall squarely within the general category of "standards of performance," which *is* specifically referenced in the clause.[14]

The ALJ makes other missteps in his analysis as well. For example, in an attempt to characterize the Company's contractually-provided right to "adopt and enforce rules and regulations and policies" as too "general" to give rise to waiver, the ALJ turns again to *California Offset Printers*, which, as discussed above, declined to find clear and unmistakable waiver of the union's right to bargain over unilateral implementation of an on-call policy based on a management right to "establish and enforce shop rules." (ALJD, p. 21, lines 24-31). But a closer examination of *California Offset Printers* reveals that the Board overturned the judge's finding of waiver primarily because it found the term "shop rules" to pertain only to *on-duty*

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[14] *See also Uforma/Shelby Bus. Forms v. NLRB*, 111 F.3d 1284, 1289-90 (6th Cir. 1997). In *Uforma*, the Sixth Circuit held that an employer's contractually-retained management right to "schedule and assign work to employees; to establish and determine job duties and the number of employees required thereof" clearly and unmistakably waived the union's right to bargain over the employer's unilateral elimination of a shift, even though the parties' management rights provision did not explicitly state that the employer had the right to "eliminate a shift." The court found that under the above-quoted management rights language, the employer had "broad powers," which "necessarily encompass the ability to reschedule and layoff the members of a given shift." *Id.* at 1290. Notably, the court stated: "The reasoning of the ALJ [who ruled that there had been no waiver] exalts form over substance by suggesting that collective bargaining agreements must catalog every conceivable permutation of a decision to layoff, such as delineating with precision each position or work force percentage which an employer may reschedule and layoff." *Id.*

conduct "within the shop," and thus did not encompass the Company's regulation of *off-duty* conduct. 349 NLRB at 735. Although the Board stated that even a more generous interpretation of the term "shop rules" would not pass muster under the clear and unmistakable standard because it was akin to a "broadly worded management rights clause," the employer's unadorned right to "establish and enforce shop rules" in *California Offset Printers* still cannot be analogized to the contract language in this case. *Id.* The parties' management rights clause does not just baldly reference "shop rules"; rather it expressly reserves to the Company the enumerated rights to "adopt and enforce rules and regulations and policies." This all-encompassing language is flanked by specific references to the Company's separate rights to "discipline and discharge for just cause" and "set and establish standards of performance for employees" – terms which are conspicuously absent from the management rights clause in *California Offset Printers.*

The ALJ's reliance on *Ciba-Geigy Pharmaceuticals*, 264 NLRB 1013, 1016 (1982) is similarly flawed. The ALJ cites *Ciba-Geigy* for the proposition that a clause reserving the employer's right to "continue and change reasonable rules and regulations as it may deem necessary and proper" does not give rise to a waiver of a union's right to bargain over the unilateral implementation of a new absenteeism policy. (ALJD, p. 21, lines 31-36). However, such perfunctory language cannot be compared to the highly detailed management rights provision here, which, unlike the clause in *Ciba-Geigy*, contains specific references to the Company's right to discipline and set performance standards along with the right to establish rules, regulations, policies and procedures. Furthermore, *Ciba-Geigy*, like *California Offset Printers*, involved enactment of a policy setting forth new grounds for discipline, which, as discussed above, is not the case here. As such, *Ciba-Geigy* also has no bearing on the instant matter.

Despite asserting that *Kennametal, Inc.*, 358 NLRB No. 68 (2012) and *Quebecor World Mt. Morris II*, 353 NLRB 1 (2008) – both cited by the Company in its post-hearing brief – are of "no precedential force," the ALJ proceeds to adopt the reasoning of the above-referenced cases in support of his recommended decision. Precedential effect aside, the ALJ's analysis of *Kennametal* and *Quebecor* is entirely misplaced, and cannot be credited. In *Kennametal*,[15] the Board held that two standalone safety provisions in the parties' collective bargaining agreement – each of which stated, respectively, that the employer had the right to "continue to make reasonable provisions for the safety and health of its employees" and "establish reasonable safety and health rules," but again, *read together* by the Board – authorized the employer to unilaterally issue rules defining unsafe conduct, but did not waive the union's right to bargain over the disciplinary rules regarding such conduct. *Kennametal*, 358 NLRB No. 68 at *3. In so ruling, the Board noted that nothing in either of the safety provisions or the collective bargaining agreement as a whole referenced the employer's rights with respect to discipline, thus precluding the employer from unilaterally changing the disciplinary consequences of employee safety violations. *Id.* The reasoning in *Kennametal* has no application here. First, *Kennametal* involved two provisions strictly concerned with safety, rather than a management rights clause. This distinction is significant, as a management rights clause is typically negotiated with the intent to reserve to the employer a broad swath of privileges relating to the operation of its business, whereas a safety provision is negotiated with a much narrower subset of considerations in mind (those pertaining to safety). As such, it may have been reasonable for the Board to limit its finding of waiver to the right to enact safety regulations; however, the *Kennametal* analysis does not govern the interpretation of the management rights language in this case. More

[15] In its post-hearing brief, the Company cited *Kennametal* for the general proposition that a contractual provision authorizing an employer to take a particular action may constitute a waiver of bargaining rights over that subject. The Company never suggested, as the ALJ implies, complete factual parallel.

importantly, the collective bargaining agreement in *Kennametal* contained no reference to the employer's rights regarding discipline. Here, by contrast, the Company's right to "discipline and discharge for just cause" is not only expressly acknowledged in the Agreement's management rights provision, but is also immediately followed by specific references to the Company's authority to "adopt and enforce rules and regulations and policies and procedures" and "set and establish standards of performance for employees" – terms which necessarily encompass the subject of attendance, as well as the authority to revise disciplinary procedures.

The ALJ's attempt to distinguish *Quebecor* (which the Company did cite for its factual similarities to this case) fares no better. In *Quebecor*, the employer retained, pursuant to a management rights clause, the right to "discipline or discharge for cause" and to "establish and apply reasonable standards of performance and rules of conduct." Despite such language, the union objected to the employer's unilateral implementation of a "performance improvement procedure (PIP)," which the Board found was a disciplinary mechanism meant to address employee work performance. The Board ruled in favor of the employer, holding that the "combination" of the two above-referenced rights amounted to a clear and unmistakable waiver of the union's right to bargain over the "unilateral establishment and application of disciplinary procedures for work-performance issues." *Quebecor*, 353 NLRB at 3. The ALJ contends that *Quebecor* is distinguishable because in that case, the unilateral action involved "standards of performance" – a term that was specifically referenced in the contract language at issue – whereas the words "attendance" and "tardiness" do not appear in the parties' management rights language here. However, as discussed above, the work rules regarding absenteeism and tardiness *are* unquestionably "standards of performance" and the changes at issue apply certain disciplinary procedures to such conduct. Furthermore, as in *Quebecor*, the Company has, by

virtue of the parties' management rights clause, the right to "discipline and discharge for just cause" and to "set and establish standards of performance." Accordingly, the ALJ misapplied *Quebecor*, and the Union has waived its right to bargain over the Company's unilateral changes.

b. The ALJ's Erroneous Interpretation of the Parties' Bargaining History

The ALJ also concluded that the parties' bargaining history undercuts rather than supports a finding of waiver. (ALJD, p. 23, lines 6-7). The ALJ bases this erroneous conclusion on a grossly inaccurate version of the facts. For instance, the ALJ contends that the parties' bargaining history stands directly in opposition to the Company's waiver claim because the 2005 Absenteeism Policy was purportedly the product of "extensive bargaining between the parties" and "enacted...based on an explicit written agreement between the Union and the [Company]." (ALJD, p. 23, lines 16-20). However, there is simply no evidence in the record of bargaining, let alone "extensive" bargaining, over any aspect of the 2005 Absenteeism Policy. At the hearing, Miller testified that the matter had been raised at the Company's initiative, while Ripka testified that it was the Union who requested a new policy to "provide more certainty and consistency about attendance expectations." (ALJD, p. 5, lines 23-27). In any event, the record shows that throughout 2003 and 2004, the parties engaged in discussions regarding potential revisions to the absenteeism policy, and that in 2005, the Company – following input from the Union – implemented the 2005 Absenteeism Policy. The 2005 Absenteeism Policy does indeed begin with the preface: "The Company and the Union Committee have agreed to the following terms." But there is no indication in the record – whether in the form of documentary evidence or witness testimony – that the parties' discussions leading up to the implementation of the 2005 Absenteeism Policy constituted bargaining, that either the Company or the Union requested to bargain over the 2005 Absenteeism Policy, or that the 2005 Absenteeism Policy was the result of

any purported bargaining. Indeed, based on the evidence in the record, it is just as likely as not that the Union "agreed" to the 2005 Absenteeism Policy because it knew the Company was prepared to implement the policy either way.

More significantly, even if the parties' communications regarding the 2005 Absenteeism Policy had constituted bargaining (which they did not), the ALJ blatantly ignores the fact that those discussions occurred *before* the negotiation of the expanded management rights language in 2006. The pivotal issue underlying the question of waiver in this case is whether the Union, by agreeing to the expanded management rights clause, waived its right to bargain over certain work rule changes at the 2006 contract negotiations. Any events, discussions, requests, or even actual bargaining occurring prior to the 2006 negotiations are therefore irrelevant. Accordingly, the ALJ erred in considering the parties' pre-2006 "bargaining" history when evaluating the Company's waiver argument.

As for the parties' post-2006 bargaining history, the ALJ misstates – and misconstrues – those facts as well. The ALJ points to the Company's decision in late 2006 (following incorporation of the expanded management rights language into the contract) not to implement certain proposed work rule changes after the Union purportedly sent two letters requesting bargaining over the revisions as "evidence" that no waiver resulted from the management rights provision. (ALJD, p. 23, lines 23-26). But there is no evidence that the Company ever acknowledged an obligation to bargain in response to the letters, or that the Company abandoned the proposed changes *because* of the letters. Rather, the Company declined to implement the changes solely due to Ripka's comment to Fenush that the concerns driving the proposed revisions could be resolved by application of the then-current rules, which falls under the heading of "Don't pick a fight when you don't have to." Conversely, the ALJ tries to minimize

the significance of the Union's conduct at the parties' most recent contract negotiations in 2014, during which the Union proposed revising the management rights clause to, among other things, incorporate the work rules directly into the collective bargaining agreement and to expressly require negotiation over any changes made to the rules during the term of the Agreement. The ALJ attempts to characterize the Union's conduct as "an effort to adapt" to the Company's allegedly "unlawful" conduct; however, the fact remains that such proposals would not have been made unless the Union recognized that the Company had (and still has) the right, under the management rights provision, to unilaterally implement changes to the work rules.

Finally, the ALJ relies (again) on *California Offset Printers*, an entirely inapposite case (*see supra*), to contend that the parties' extensive, six-day-long negotiations over the precise wording of the management rights clause in 2006 (R. Exs. 3-A – 3-E) – during which the Union deliberately carved out certain subjects (*i.e.*, the right to change shift duration and the right to hire subcontractors) from the reach of the clause, and even made concessions on certain of its other proposals in exchange for the Company's agreement to such changes – did not operate as a waiver by the Union of all other management rights not discussed at the negotiations. As an initial matter, *California Offset Printers* is distinguishable on this score as well; the parties in that case did not engage in any bargaining over the language of the management rights clause – a fact that is expressly acknowledged by the Board in its decision ("Absent some additional evidence, such as *bargaining history*, the 'shop rules' provision and the right to 'maintain discipline' do not indicate that the Union clearly and unmistakable waived its right to bargain over the directive at issue here"). 349 NLRB at 735 (emphasis added). More importantly, in so finding, the ALJ failed to take into account the Board's ruling in *Southern Florida Hotel & Motel Assn.*, 245 NLRB 561, 568 (1979), which the Company cited in its post-hearing brief. In that case, the

employer advanced a proposal to the union to expand its rights with respect to work rules under a management rights clause. The parties then engaged in extensive discussions regarding the wording and potential effect of the clause, during which the union made "apprehensive comments" about the scope of the proposed language. *Id.* Ultimately, the union agreed to the modified contract provision, which the Board held to constitute a "broad waiver" of the union's right to be notified of and to bargain about changes in working conditions. *Id.* Despite the parallels between *Southern Florida* and the instant matter – which compel a finding of "broad waiver" in this case – the ALJ simply ignores *Southern Florida*, and opts to focus on the factually dissimilar decision in *California Offset Printers*. In sum, the ALJ's reliance on wholly inapposite case law and his misinterpretation of both the evidentiary record and the case law cited by the Company are insufficient to support his erroneous finding of "no waiver." For these reasons alone, the ALJ's conclusion that the Company acted unlawfully when it unilaterally changed the rules at issue must be set aside.

2. Even if the ALJ Correctly Applied Current Board Law, the Proper Standard Should Be the "Contract Coverage" Analysis

Notwithstanding the Board's adherence to the "clear and unmistakable" standard (*see Provena*, 350 NLRB at 810), and that the record evidence in this case supports a finding of waiver by the Union under this standard, the Company asserts that the "contract coverage" approach – endorsed by no less than three federal appellate courts and a growing faction of Board members – is the proper standard to apply in waiver cases. *See Bath Marine Draftsmen's Assoc'n*, 475 F. 3d 14 (1st Cir. 2007); *NLRB v. USPS*, 8 F. 3d 832 (D.C. Cir. 1993); *Dept. of the Navy v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *Chicago Tribune Co. v. NLRB*, 974 F. 2d 933 (7th Cir. 1992); *Centurylink*, 358 NLRB No. 134, at *4 (2012) (Hayes, dissenting); *Provena*, 350 NLRB at 816-818 (Battista, dissenting); *Baptist Hospital*, 351 NLRB at 72 n. 7; *California*

Offset Printers, 349 NLRB at 739 (Schaumber, dissenting); *Dorsey Trailers, Inc.*, 327 NLRB 835, 836-37 (1999) (Hurtgen, dissenting); *Exxon Research & Engineering Co.*, 317 NLRB 675, 676-77 (1995) (Cohen, dissenting). Under a "contract coverage" analysis, unilateral change allegations under Section 8(a)(5) will be dismissed "where there is a contract clause that is relevant to the dispute." *Baptist Hospital*, 351 NLRB at 72 n. 7. The reasoning underlying the "contract coverage" doctrine stems from the notion that "when an employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations." *USPS*, 8 F.3d at 836. Following such agreement, there is "no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract." *Id.* Here, the parties' expansive management rights language – which addresses the Company's retained rights to discipline, adopt rules, regulations, policies and procedures, and establish standards of performance – is indisputably "relevant" to the matter at hand, and as such, plainly meets the requirements of the "contract coverage" test with respect to the work rule changes at issue. Thus, under either the Board's "clear and unmistakable waiver" analysis or a "contract coverage" standard, the Company had no obligation to bargain with the Union over the rule revisions.

a. The Board Should Adopt and Apply the Contract Coverage Test

As noted by the ALJ, the Board's current "clear and unmistakable" standard requires the parties to "specifically" reference the subject matter of the dispute at issue in order for a waiver of bargaining rights to be found. (ALJD, p. 20, lines 32-36; p. 21, lines 13-16). However, as explained by Member Hayes in his dissent in *Centurylink*, the fatal flaw of this approach is that it "imposes the impossible task of requiring parties to bargain with specificity about the unforeseen." 358 NLRB No. 134 at *4. Under the "clear and unmistakable" standard, "a negotiated contract provision becomes merely a starting point for continuing negotiations during

the term of a contact about the application of the provision." *Id.* Indeed, by the ALJ and the Board's reasoning, an employer who desires to retain any appreciable latitude in acting unilaterally to direct its business would be required to explicitly reference in the contract the subject matter of every conceivable management decision it might make during the life of the agreement. However, "it is naïve to assume that bargaining parties [will] anticipate every hypothetical grievance and purport to address it in their contract." *USPS*, 8 F. 3d at 838. "Rather, a collective bargaining agreement establishes principles to govern a myriad of fact patterns." *Id.* (emphasis added).

Moreover, even if the parties (being cognizant of the "clear and unmistakable" standard championed by the Board) did attempt to address any and all situations that might arise during the course of the agreement, there is always the possibility that the Board will require a greater level of specificity than that provided in the contract – unless the subject matter and/or circumstances of the employer's action is identified in the language verbatim (which is a rare occurrence). For instance, the ALJ concluded that there was no "clear and unmistakable" waiver of the union's right to bargain over the work rule changes because the parties' management rights clause contains no specific references to attendance, absenteeism or changing the standards for progression of discipline. But even assuming, *arguendo*, that the clause did explicitly reserve to the Company a management right to "change rules relating to discipline," such language might still be held by the ALJ and the Board to fall short of the "clear and unmistakable waiver" standard as applied to (for instance) the Company's clarification of its policy on tardiness because the word "tardiness" does not appear in the clause. As this example demonstrates, the clear and unmistakable analysis provides no meaningful guidance to parties, inasmuch as it creates a completely unworkable and subjective standard that precludes the

parties, except in rare instances, and without input from the Board, from determining whether bargaining rights regarding a particular subject matter have been waived.[16]

Additionally, the "clear and unmistakable" analysis deprives employers of the benefit of the bargain they have made with the union. The "specificity" required under the current standard chips away at – and in some cases, eviscerates – management rights employers have deliberately preserved through the collective bargaining process by requiring employers to re-negotiate such terms during the life of the agreement. Here, the all-encompassing nature of the parties' management rights language – clearly intended by the Company (and the Union, by virtue of its agreement to same) to retain as much management discretion as possible, now has the perverse effect, under the ALJ's application of the "clear and unmistakable" standard, of divesting the Company of the very rights it sought to protect. As Member Hayes stated in his dissenting opinion in *Centurylink*, "this outcome is contrary to the statutory policy underlying the enactment of Section 8(d) [of the Act], intended to give finality to collective bargaining agreements."[17] 358 NLRB No. 134 at *4. Indeed, at least one legal commentator has stated: "By treating broad grants of rights from union to management as if they did not exist, the Board is rendering negotiations for an employer an uncertain proposition at best, and an illusory proposition at worst." MATTHEW D. LAHEY, *I Thought We Had a Deal?! – The NLRB, The Courts and The Continuing Debate Over Contract Coverage vs. Clear and Unmistakable Waiver*

[16] Nor should intervention by the Board be standard protocol in interpreting and administering the negotiated agreement between the parties. The United States Supreme Court has held that "although the Board has occasion to interpret collective-bargaining agreements in the context of unfair labor practice adjudication, the Board is neither the sole nor the primary source of authority on such matters." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 203 (1991); *see also Centurylink*, 358 NLRB No. 134 at *4 (stating, in Member Hayes' dissent: "The Board has no special expertise and is entitled to no deference in the interpretation of collective-bargaining agreements").

[17] Section 8(d) of the Act imposes upon employers and union the obligation to bargain collectively, and also provides that parties to a collective bargaining agreement under the Act generally may not terminate or modify such a contract. 29 U.S.C. § 158(a)(8)(d).

(March 1-4, 2009) http://apps.americanbar.org/labor/dlcomm/mw/papers/2009/papers/mw-g.pdf. The Board, and ALJ, in this instance, should not be able to abrogate a lawful agreement between an employer and a union "merely because one of the bargaining parties is unhappy with a term of the contract and would prefer to negotiate a better arrangement." *USPS*, 8 F.3d at 837.

Finally, the Board should adopt the contract coverage standard not only to eliminate the conflict between the agency and the First, Seventh and D.C. Circuit courts (*see supra*), but also to "harmonize its views with the grievance-arbitration process." *Provena*, 350 NLRB at 816. As explained by then-Chairman Battista in his dissent in *Provena*, under the current approach, the Board presupposes that a unilateral change is violative of Section 8(a)(5) unless the exacting "clear and unmistakable" standard is met, while an arbitrator, considering only whether the contract "covers" the situation at issue and whether there has been a breach of such contract, may rule differently. *Id.* at 817. The potential disparity in outcome is likely to encourage forum-shopping by parties seeking to resolve unilateral change disputes when most collective bargaining agreements provide for a grievance and arbitration procedure to fulfill this very purpose. *Id.* This "danger of discord" between the Board and arbitration is not, as the *Provena* majority contends, eradicated by the Board's deferral mechanism, because whether the Board will find an arbitral decision to be "palpably wrong" under the Act is difficult to foresee, and in any case, deferral proceedings generate litigation at the Board level in addition to that which has already occurred before the arbitrator, impeding the efficient resolution of labor disputes between unions and employers. *Id.* Although the contract coverage analysis is a departure from agency precedent, the Board should nevertheless adopt this standard because it is, for all of the foregoing reasons, the "better approach." *Id.* at 818

b. The Subject Matter of the Work Rules at Issue Is Covered By the Agreement's Management Rights Clause

Under a "contract coverage" analysis, where there is a contract clause relevant to the dispute – that is, if there is language that can reasonably be interpreted as dealing with the subject matter at issue – it can be said that the parties have bargained about the subject and there can be no refusal to bargain under Section 8(a)(5). *See Baptist Hospital*, 351 NLRB at 72 n. 7; *Provena*, 350 NLRB at 817 n. 4. Rather, the contract will control, and the question of waiver is irrelevant. *Chicago Tribune*, 974 F. 2d at 937; *USPS*, 8 F. 3d at 836; *see also Bath Marine*, 475 F.3d at 23 ("Once a subject is covered by a collective bargaining agreement, any dispute regarding that subject is an issue of contract interpretation, and the question of whether a union has waived its right to bargain over the subject does not come into play.").

The parties' management rights language in this case plainly meets this standard and absolves the Company of any obligation to bargain with the Union regarding the work rule changes. The Company's contractually-reserved rights to "discipline and discharge for just cause," "adopt and enforce rules and regulations and policies and procedures," and "set and establish standards of performance for employees" are reasonably interpreted as covering the Company's March 2014 revisions to its discipline and attendance policies, and are thus relevant to the instant dispute. *See Provena*, 350 NLRB at 818 (Member Hayes finding, in his dissent, that contractual management rights to "establish and change the hours of work (including overtime work) and work schedules" and allowing "extraordinary pay" for extra hours worked were relevant to the parties' dispute regarding the employer's unilateral implementation of an incentive pay policy); *Local 15, IBEW v. Exelon Corp.*, 495 F.3d 779, 783 (7th Cir. 2007) (holding that a management rights clause – which retained employer's right to "promulgate workplace rules" – reserved to the employer the authority to unilaterally implement a new call-out policy under the "contract coverage" standard); *USPS*, 8 F. 3d at 838 (holding that service

reductions were clearly within the compass of the parties' management rights clause, which granted the employer the exclusive authority to "transfer and assign employees" and "to determine the methods, means and personnel by which its operations are to be conducted," as well as the more general right "to maintain the efficiency of the operations entrusted to it"; the court held that these rights "surely permit an employer unilaterally to rearrange its employees' work schedules"). The fact that the parties' management rights language preserves the Company's general authority to discipline, promulgate rules, regulations, policies and procedures, and institute performance standards without explicitly referencing attendance, absenteeism and/or changes to the aforementioned subjects is of no moment, as the "breadth of a contractual provision need not detract from the clarity of its meaning." *Chicago Tribune*, 974 F. 2d at 937. "Indeed, a management rights clause can be drawn so broadly as to leave no doubt that a particular regulation was intended to be within its scope." *Id.* Accordingly, there has been no refusal to bargain by the Company with respect to the work rule changes, and the Section 8(a)(5) allegations must be dismissed. *See id.*; *Provena*, 350 NLRB at 818; *Local 15, IBEW, 495 F. 3d at 783; USPS*, 8 F. 3d at 838.

3. The ALJ Erred by Concluding that the General Counsel Established That "Material, Substantial and Significant" Changes Had Been Made to the Rules

Even if, contrary to the record evidence, it is determined that there has been an otherwise unlawful unilateral change, the General Counsel bears the initial burden of demonstrating that a unilateral work rule change is "material, substantial and significant." *See Berkshire Nursing Home,* 345 NLRB at 220-221. A change is considered "material, substantial and significant" if it has a "direct" impact on employee working conditions. *Goya Foods of Florida*, 351 NLRB 94, 102 (2007). However, even if such a showing is made, the change does not violate Section

8(a)(5) if the employer was in some way privileged to make the change. *See Fresno Bee*, 339 NLRB at 1214.

Seemingly oblivious to this exacting standard, the ALJ concluded that it was "self-evident" that the Company's work rule changes – including the fine-tuning of its tardiness policy, clarification of its "reset" period, combining of Group A and Group B violations for purposes of progressive discipline, and reclassification of "sleeping on the job" and "failure to follow proper-lock out procedures" as Group B violations – were significant and material, and required bargaining.[18] (ALJD, p. 16, lines 45-51; p. 17, lines 1-31; p. 18, lines 1-7). However, the ALJ bases his conclusion on assumptions with absolutely no support in the record, and in some cases, on no evidence at all. For instance, the ALJ contends that the combining of Group A and Group B violations constitutes a "significant change" because "there is no indication that Group A and Group B violations were combined" under the old policy. (ALJD, p. 5, lines 1-3; p. 17, lines 26-27). But there is also no indication that Group A and Group B violations were *not* combined prior to March 2014, and it is incumbent on the General Counsel to show that this was the case. He has not. As discussed above, the only evidence the General Counsel presented on this score was Ripka's testimony that "to [his] knowledge," there was no "pyramiding" of Group A and Group B violations prior to March 2014. The General Counsel did not offer any evidence regarding the meaning of the term "pyramiding," and furthermore, Ripka's assertion was contradicted by Turecky's unrebutted testimony that the Company and the Union had a difference of opinion as to whether A violations and B violations could be combined for purposes of determining the appropriate disciplinary step (*see* footnote 7). The ALJ also

[18] The ALJ also found (as the parties stipulated at the hearing – *see supra*) that the Company's changes to the 2005 Absenteeism Policy were "material and substantial." (ALJD, p. 16, lines 48-51; p. 17, lines 1-3). As to those changes, the Company relies on its argument that the Union clearly and unmistakably waived its bargaining rights with respect thereto (*see supra*).

contends – in "support" of his finding of a "significant change" – that prior to March 2014, the combining of Group A and Group B violations was "not possible as each group had distinct discipline progressions." (ALJD, p. 17, lines 27-28). This is simply untrue. Despite their separate disciplinary tracks, Group A and Group B violations could be combined under the old policy; the Company and the Union just couldn't agree on *how* they should be combined. It was this disagreement that prompted the Company to create the grid and incorporate it into the work rules – that is, to clarify and distill into some concrete format how any given series of Group A and Group B violations would be treated for purposes of disciplinary action. But there is *no* evidence in the record to suggest that the combining of Group A and Group B violations is a departure from the manner in which the Company imposed discipline prior to implementation of the new rules. Accordingly, the Company's action in this respect was not material or significant, and did not trigger an obligation to bargain. *See Optica Lee Borinquen, Inc.*, 307 NLRB 705, 716 (1992) (holding that work rule changes "amounting to mere language adjustments which either codify previously announced procedures, eliminate ambiguity, or ***articulate procedures undeclared***, but [are] implicit in an existing body of rules or restrictions," are immaterial, and do not require bargaining) (emphasis added).[19]

[19] The Company maintains – as set forth in its post-hearing brief – that the addition of the grid did not change the relationship between the Company and bargaining unit employees in terms of discipline because any discipline issued pursuant to the new rules (and the grid), if grieved and arbitrated, would still have to be measured against the "just cause" standard in the Agreement. Moreover, both the old and the new rules state that they are "in no way conclusive" and that where infractions are not specifically listed, "common sense will apply." (Jt. Exs. 2 and 9). Thus, it has not been shown that the addition of the grid has materially, substantially or significantly changed the manner in which progressive discipline will be administered under the collective bargaining agreement by the Company or, upon review, by an arbitrator. The ALJ attempts to discredit this point by contending that such an argument "has been rejected by the Board" in *Tenneco Chemicals*, 249 NLRB 1176 (1980). (ALJD, p. 18, lines 9-31). This assertion misses the mark entirely. *Tenneco Chemicals* involved an employer's unilateral establishment of entirely *new* production standards that, in the union's view, required bargaining. *Tenneco Chemicals*, 249 NLRB at 1177-1179. As discussed above, that is simply not the case here. Furthermore, the argument that was "rejected" by the Board in *Tenneco* was the employer's contention that the production standards at issue did not *exist* because its supervisors had discretion with respect to whether to enforce

The ALJ's wholly unsubstantiated reasoning also is apparent in his conclusions regarding the re-categorization of former Group C work rules 4 and 11 – addressing sleeping on the job and failure to follow proper lock / tag out procedures, respectively – as Group B violations. The ALJ asserts that the shifting of both rules from Group C (infractions warranting immediate discharge) to Group B (requiring three violations for discharge) is a "material change" because it "puts other employees at risk." (ALJD, p. 18, lines 2-7). In so ruling, the ALJ ignores the Board's own statement, in *Goya Foods* (which the ALJ cites in his decision), of what constitutes a "material, substantial and significant" change – *i.e.*, the change must have a direct impact on employee working conditions. 351 NLRB at 102. Here, the impact of the above-described reclassifications on employee working conditions is attenuated at best; indeed, the General Counsel presented no evidence that there have been an increased number of safety incidents because of the change, or that employee working conditions have suffered or carry a higher risk of harm as a result. As such, there has been no significant or material change with respect to the sleeping or lock out / tag out rules. *See Flambeau Airmold Corp.*, 334 NLRB 165 (2001) (affirming judge's ruling that an employer's unilateral elimination of certain positions was not a significant and material change with respect to the employer's expediter employees because there was no evidence in the record of the impact, if any, on the expediters' job duties as a result of the change).

Finally, the ALJ fails to cite to *any* Board authority in support of his findings of "material" and "significant" change. This omission is particularly pronounced with respect to

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the standards and impose discipline in connection such enforcement. *Id.* at 1179-180. This is not the argument advanced in the Company's post-hearing brief. The Company is not contending that the new work rules do not exist. Rather, the Company's point is that the General Counsel has not shown – as he must, in order to establish a violation – that the disciplinary relationship between the Company and unit employees has changed when all discipline is still measured, ultimately, against the same standards – the Agreement's "just cause" provision, and where no rule is applicable, "common sense." Thus, *Tenneco Chemicals* has no bearing on the instant matter, and the ALJ's reliance on it cannot be credited.

the Company's clarifications regarding its policy on tardiness and the one-year disciplinary "reset" period. (ALJD, p. 17, lines 5-8, 10-22). In fact, the Board has repeatedly held that changes constituting "mere particularizations of, or delineations of means for carrying out, an established rule or practice" do not rise to the level requiring bargaining. *E.g., Optica Lee*, 307 NLRB at 716. Here, the Company's recalibration of the rules pertaining to tardiness and the reset period fall squarely within this category; indeed, the Company had always maintained a rule addressing "continued tardiness," which was simply restyled in 2014 as a separate "Policy on Tardiness" and clarified to define "continued tardiness" as more than three incidents of lateness in any twelve month period. *See id.* (finding that work rule changes consisting of language adjustments to eliminate ambiguity are merely delineations of means for carrying out an established rule or practice, and do not require bargaining). However, chronic tardiness remained a Group A violation, the penalties for which, as discussed above, were not changed. The General Counsel presented no evidence, and the ALJ cites nothing in the record, to show how the Company or the Union defined "continued tardiness" prior to the rule changes. In short, the ALJ determined that the work rule changes were "material, substantial and significant" despite the General Counsel's failure to produce *any* evidence to support such a finding. Such an approach is directly at odds with the standard articulated by the Board; accordingly, the ALJ has erred in reaching his conclusion. Furthermore, even if the General Counsel had met his burden of proof, and the ALJ was correct in finding that the changes were material – neither of which is the case – the Company was still privileged to unilaterally implement such changes by virtue of the parties' expansive management rights language (*see supra*).

B. The ALJ Erred by Declining to Defer the Remaining Unilateral Change Allegations to Arbitration After Dismissing the Information Request Allegations

The Board has long recognized that it should, in appropriate cases, postpone its own proceedings until an available arbitration remedy has been completed. *Collyer Insulated Wire*, 192 NLRB 837, 841-42 (1971); *see also* General Counsel's May 10, 1973 Memorandum "Arbitration Deferral Under *Collyer* – Revised Guidelines," and January 20, 2012 Memorandum, "Guideline Memorandum Concerning Collyer Deferral Where Grievance-Resolution Process is Subject to Serious Delay. As explained in *Collyer*, where:

> "[t]he contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the [u]nion and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties."

192 NLRB at 841-42. This standard was reaffirmed by the Board in *United Technologies Corp.*, 268 NLRB 557 (1984). Indeed, the Board has repeatedly acknowledged its obligation to refrain from pursuing an unfair labor practice proceeding if the collective bargaining agreement provides for arbitration as a method of resolving disputes over the meaning and application of the agreement. *Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet*, 228 NLRB 828, 829 (1977) (holding that the Board's policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when the parties have voluntarily established by contract a binding settlement procedure). *See also Burns Int'l Security Services v. NLRB*, 146 F.3d 873, 875 (D.C. Cir. 1998) *relying on McDonnell Douglas Corp. v. NLRB*, 59 F.3d 230, 233-34 (D.C. Cir. 1995).

The Board recently has acknowledged that there are additional rationales for deferring Section 8(a)(5) matters in particular. Memorandum GC 12-01 (January 20, 2012). First, in many Section 8(a)(5) cases, "the issue is whether the employer had a contractual right to take the action contested, and any violation of the Act in such cases turns entirely on contract

interpretation," such that the Board's expertise is not required. *Id.*, *citing Roy Robinson*, 228 NLRB at 832. The Board, moreover, has clarified that matters of contract interpretation "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." *Id., quoting Collyer*, 192 NLRB at 839. "Furthermore, it would be detrimental to the goal of promoting stable labor-management relationships through collective bargaining if the Board were to interpose itself in a matter of contract interpretation. Resolution of disputes arising out of contractual provisions are best left to the parties through the steps of the agreed-upon grievance procedure, as well as by the arbitrator specially chosen to interpret the contract." *Id.*

At the hearing and in its post-hearing brief to the ALJ, the Company urged the ALJ to recommend deferral of this matter to the grievance and arbitration process provided for in the parties' collective bargaining agreement, pointing out that the Complaint's unilateral change allegations easily meet the standard for deferral set forth in *Collyer* and *United Technologies Corp.*, and that the Board's own recent guidance has acknowledged Section 8(a)(5) matters as being particularly well-suited for deferral. Memorandum GC 12-01 (January 20, 2012). Alternatively, recognizing that the Board generally does not defer information request cases to arbitration, the Company argued that the ALJ should recommend partial deferral of the unilateral change allegations to arbitration and allow the information request allegations (if not dismissed for lack of merit) to be assessed independently by the Board – a practice routinely utilized by the Board in cases similar to the one at hand. *See e.g,. Clarkson Industries, Inc.*, 312 NLRB 349, 353 (1993).

Noting (as the Company acknowledged in its post-hearing brief) that the Board generally does not defer information request cases to arbitration, the ALJ refused to grant the Company's request for partial deferral of this matter (that is, deferring the unilateral change allegations to arbitration, while allowing the information request allegations (if not dismissed for lack of merit) to be assessed independently by the Board), finding that the Company's "defense to the information-request allegations is 'derivative' of its defense to the unilateral-change allegations." (ALJD, p. 14, lines 12-13, 33-34). The ALJ's ruling turned solely on the fact that Board policy generally "disfavors bifurcation of proceedings that entail related contractual and statutory questions, in view of the inefficiency and overlap that may occur from the consideration of certain issues by an arbitrator and others by the Board." (ALJD, p. 13, lines 41-44). Citing this policy, the ALJ expressed concern that allowing partial deferral created a risk of "overlapping" and "inconsistent" results with respect to the unilateral change allegations, as both the arbitrator and the Board would be required to analyze such claims in order to decide the individual issue before them. (ALJD, p. 14, lines 24-31). However, the ALJ then went on to dismiss the information request allegations pursuant to the standard set forth in *Raley's Supermarkets & Drug Centers*, 349 NLRB 26, 28 (2007), leaving only the unilateral change allegations to be decided. The information request allegations served as the sole basis for the ALJ's conclusion that deferral in this case is inappropriate. As such, the need for partial deferral has been eliminated, along with any attendant "inconsistency" risks that might preclude deferral.

The remaining unilateral change allegations are well-suited for deferral under the standards of *Collyer* and *United Technologies*. Article XXI ("Grievances") of the parties' Agreement makes clear that the parties intended to make the grievance and arbitration machinery their forum for resolving disputes. There is no evidence that the work rule changes in this case

were designed to "undermine" the Union; rather, the changes were effected solely for the purpose of fulfilling the Company's performance and production goals. More importantly, the changes at issue were implemented pursuant to a "claim of contractual privilege" – namely, the exercise of the Company's authority to "discipline and discharge for just cause," "adopt and enforce rules and regulations and policies and procedures," and "set and establish standards of performance" under the Agreement's management rights clause. The interpretation by an arbitrator of the Company's right to make such changes under the Agreement will resolve both the unfair labor practice issue and the contract interpretation issue, obviating the need for the Board's expertise – a result that is consistent with the Board's stated rationales for encouraging deferral of Section 8(a)(5) cases. Furthermore, the Company has expressed its willingness to arbitrate these disputes using the parties' agreed-upon grievance and arbitration provisions and waive any timeliness or procedural defenses under same (*see* footnote 9). Finally, there is no evidence to suggest that use of the contractual grievance and arbitration procedure would be unpromising or futile, or that arbitration would not be completed within one year.[20] Accordingly, the ALJ erred in denying the Company's request for deferral, and the remaining unilateral change allegations should be deferred to arbitration, consistent with well-settled Board precedent.[21]

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[20]This one year time limit is a concern articulated in Memorandum GC 12-01 (January 20, 2012).

[21] The Union's withdrawal of the grievance it initially filed over the work rule changes does not serve as an impediment to deferral. The Board has long recognized that a Union's attempt to circumvent the parties' contractually-provided grievance and arbitration procedure by appealing directly to the Board instead of first filing a grievance is at odds with the spirit and intent of the Act. As explained in *United Technologies*:

> "Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is ***contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery.... In our view, the statutory purpose of encouraging the practice***

C. The Remedy Ordered by the ALJ to "Collectively Bargain" Regarding "Any Changes in... Terms and Conditions of Employment" of the Bargaining Unit Employees is Overly Broad and Improper

Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has been committed, to correct the effects of the unfair labor practice by requiring the violating party "to cease and desist from such unfair labor practice, and to take such affirmative action including . . . , as will effectuate the policies of this Act. 29 § U.S.C. 160(c). In developing remedies for specific situations, the Board must attempt to create "a restoration of the situation, as nearly as possible, to that which would have obtained" but for the unfair labor practices. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). To this end, the Board's discretion to fashion remedies is not unfettered, but must be "calculated to effectuate a policy of the Act," (*NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953)) and must not be punitive (*Local 60, United Brotherhood of Carpenters v. NLRB*, 365 U.S. 651, 655 (1961)). The Board's authority to remedy unfair labor practices also does not include "authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct." *NLRB v. Express Publishing Co.*, 312 U.S. 426, 433 (1941).

> ***and procedure of collective bargaining is ill-served by permitting the parties to ignore their agreement and to petition this Board in the first instance for remedial relief....***
>
> [Deferral] is not akin to abdication. It is merely the prudent exercise of restraint, a postponement of the use of the Board's processes to give the parties' own dispute resolution machinery a chance to succeed. The Board's processes may always be invoked if the arbitral result is inconsistent with the standards of *Spielberg* [*Mfg. Co.*, 112 NLRB 1080 (1955)]."

268 NLRB at 559-60 (emphasis added); *see also Hickey Electrical Contractors, Inc.*, 315 NLRB 1 (1994) (granting employer's motion to dismiss Board-issued complaint alleging violations of Section 8(a)(1) and 8(a)(3) and defer the matter to arbitration where neither the union nor the charging party had filed a grievance pursuant to the grievance-arbitration procedure set forth in the parties' collective bargaining agreement).

Rather, broad orders are reserved for violations that are so severe or numerous and varied as to demonstrate a general disregard for fundamental employee rights. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

In the matter presented, the breadth of the affirmative action remedy ordered by the ALJ does not effectuate any policy of the Act, and indeed is punitive inasmuch as it is not limited to proscribing the unilateral conduct forming the basis of the alleged violations of the Act, and further prohibits *any* unilateral action by the Company, notwithstanding that the Company may have the right, whether by Union waiver or past practice, to take such unilateral action. *See e.g.*, *Omaha World-Herald*, 357 NLRB No. 156 (December 30, 2011) (finding that the employer did not violate Section 8(a)(5) by unilaterally implementing changes to benefit plans without giving the Union an opportunity to bargain, where the Union contractually waived its right to bargain over those changes); *United States Postal Service*, 350 NLRB 441 (2007) (finding that employer did not violate Section 8(a)(5) by promulgating a rule prohibiting union stewards from using stand up meetings to solicit grievances, where past practice established that such meetings were wholly controlled by management).

As his proposed remedy for the alleged violations, the ALJ recommended that the Company be ordered to, among other things, "collectively bargain" with the Union "before implementing any changes in wages, hours or other terms and conditions of employment" of the Company's bargaining unit employees. (ALJD, p. 29, lines 16-19) (emphasis added).[22] This portion of the remedy is not limited to the unilateral work rule changes at issue but applies to all unit employees' terms and conditions of employment and does not permit otherwise lawful unilateral changes by the Company. If intended as written, the remedy is too broad, punitive, and does not effectuate the policies of the Act. If unintended, the remedy must nonetheless be

[22] This broad language also was incorporated into the ALJ's proposed Notice to Employees.

modified to properly address the specific and limited underlying violations, and in a manner that permits lawful conduct. There is no reason presented (or articulated by either the ALJ or the General Counsel) in these proceedings for such a broad and punitive order, particularly where the record contains no evidence that the Company had engaged in the widespread misconduct justifying a broad and punitive remedy.

Indeed, in *National Gypsum Company*, the ALJ concluded that the employer had violated Sections 8(a)(5) and (1) of the Act by unilaterally refusing to pay the increased contribution amounts for health benefits coverage to the union's health and welfare fund after the parties' collective bargaining agreement expired and by unilaterally implementing a requirement that employees carry two locks on their person as a part of the Company's "lockout-tagout" policy. 359 NLRB No. 116, at *17 (2013). As part of his proposed remedy for the violations, the ALJ broadly ordered the employer to cease and desist from "making any changes in the unit employees' terms and conditions of employment without first bargaining in good faith with the [union] to an impasse or agreement." *Id.* The employer excepted to the cease-and-desist provisions of the ALJ's remedy, pointing out that the provisions were overly broad because they would prevent the employer from making certain lawful changes, such as those privileged by union waiver of bargaining or those consistent with an established past practice. *Id.* at *1 n. 1. The Board found merit to the employer's exceptions and modified the ALJ's cease-and-desist order and Notice to Employees accordingly to include the Board's "standard" remedial language. *Id.*

In the event that the Board upholds the ALJ's conclusion that Section 8(a)(5) and (1) violations have occurred, the proposed remedy (and accompanying Notice to Employees) should be modified to allow for lawful conduct (including lawful unilateral action), and prohibit the

Company only from engaging in the unilateral conduct that formed the basis for finding violations of the Act. *See National Gypsum*, 359 NLRB No. 116, at *1 n. 1 (modifying ALJ's overly broad proposed remedy for unlawful unilateral conduct by imposing "standard" remedial language); *see also* remedies ordered in *E.I. DuPont Nemours*, 355 NLRB No. 176 (August 27, 2010); *Union-Tribune Publishing Co.*, 353 NLRB 11 (2008).

III. CONCLUSION

For all of the reasons stated herein, the Board should sustain Respondent Graymont (PA), Inc.'s exceptions to the ALJ's decision. In the event that the Board affirms the ALJ's conclusion that Section 8(a)(5) and (1) violations have occurred, Graymont respectfully requests that the Board review and reverse the ALJ's proposed "affirmative action" remedy set forth in Paragraph 2.c. of the "Order," and modify it in such manner as to conform to the violations found, and not prohibit Graymont from engaging in otherwise lawful conduct.

Respectfully submitted,

Graymont (PA), Inc.

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Dated January 27, 2015

CERTIFICATE OF SERVICE

Eugene A. Boyle, an attorney for the Employer, hereby certifies that a true and correct copy of the foregoing Respondent Graymont (PA), Inc.'s Brief in Support of Its Exceptions to the Decision of the Administrative Law Judge was served upon the following on this 27th day of January, 2015, via the NLRB's CM/ECF system and e-mail as indicated below

Via CM/ECF

Gary Shinners, Executive Secretary
National Labor Relations Board
Room 11610
1099 14th St. NW
Washington, DC 20005-3419
(via e-filing and 8 copies by Federal Express)

Via Federal Express, and e-mail to:

Dalia Belinkoff
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Via U.S. Mail overnight to:

Local Lodge D92, United Cement, Lime,
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